IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

LESLIE GRUSSING, Plaintiff vs. ORTHOPEDIC AND SPORTS MEDICINE, INC., et al. Defendants	**Cause No. 4:15-cv-01333**

PLAINTIFF'S TRIAL BRIEF

COMES NOW Plaintiff and submits the following trial brief, in accordance with the Court's Case Management Order (#20), setting forth relevant law and argument on issues that may be relevant to trial of this matter.

FACT SUMMARY

This is a medical malpractice case arising from an arthroscopic knee debridement performed by Defendant Dr. Corey Solman ("Solman) on Plaintiff on June 24, 2014. Dr. Solman had previously performed a partial knee replacement (surfacing the patella and placing an implant in the medial femoral condyle) in 2012. On June 24th, Defendant Solman performed a minimally invasive surgery to remove some accumulated scar tissue. On July 6, 2014, 10 days after the surgery, Plaintiff woke up with severe condition change overnight. The knee was severely swollen, painful, hot and red.

On July 9, 2014, Plaintiff presented for her first post-op visit and was seen by Defendants' physician assistant, Jason Gay. Mr. Gay examined Plaintiff, found nothing unusual, prescribed physical therapy and told her to return in 4 weeks. Plaintiff was not seen by Defendant Solman. Plaintiff's knee continued to be swollen, inflamed, red, hot and painful. On July 18, 2014, Plaintiff returned early to see Defendant Solman due to continued severe pain and swelling. At that time Defendant Solman drained fluid from Plaintiff's knee. Defendant Solman looked at the fluid and determined by visual inspection that the fluid was not infected and discarded it. Defendant Solman did not send the fluid for standard analysis. Defendant Solman directed Plaintiff to continue physical therapy and ordered additional therapy modalities.

Defendant Solman saw Plaintiff again on August 8, 2014, and September 19, 2014. Defendant Solman continued to prescribe physical therapy. At no point did Defendant Solman diagnose or treat Plaintiff for an infection in her knee.

On October 30, 2014, Plaintiff was seen by another orthopedic surgeon, Dr. Frank Tull. Dr. Tull also drained fluid from Plaintiff's knee, but Dr. Tull sent the fluid for analysis. Lab analysis confirmed a chronic infection. On November 25, 2014, Dr. Tull surgically removed Plaintiff's knee and implanted a temporary knee spacer infused with antibiotics to fight the infection. Weeks of home IV antibiotics followed. On February 17, 2015, Dr. Tull removed the temporary knee spacer and implanted a permeant total knee replacement.

ANTICIPATED LEGAL ISSUES AND RELEVANT LAW

1. Evidence and argument regarding "informed consent" is irrelevant, inadmissible and highly prejudicial.

Defendants in surgical malpractice cases often examine plaintiffs on whether the complication at hand was the subject of an "informed consent" discussion between the doctor and the patient. Defendants will often highlight or introduce the signed surgical consent forms. Such evidence and testimony is irrelevant, inadmissible and highly prejudicial.

Whether an occurrence was mentioned in an informed consent discussion is irrelevant. A prima facie case of medical malpractice consists of three general elements: (1) an act or omission of the defendant that failed to meet the requisite medical standard of care; (2) the act or omission was performed negligently; and (3) the act or omission caused the plaintiff's injury. *Edgerton v. Morrison*, 280 S.W. 3d 62, 68 (Mo. banc 2009). In contrast, the doctrine of informed consent is a type of negligence that essentially relates to the duty of a doctor to disclose pertinent information to a patient. The three basic elements of an informed consent case are: (1) nondisclosure; (2) causation; and (3) injury. To prove nondisclosure, the plaintiff is required to produce expert testimony to show what disclosures a reasonable medical practitioner would have made under the same or similar circumstances. *Wilkerson v. Mid-America Cardiology*, 908 S.W.2d 691, 696 (Mo. App. 1995), citing *Aiken v. Clary*, 396 S.W.2d 668 (Mo. 1965). As such, informed consent is a subset of ordinary medical malpractice, but is a separate and distinct liability theory.

Aiken distinguished between the typical theory of negligence that consists of improper care and treatment and one based on the "alleged failure to inform the patient sufficiently to enable him to make a judgment and give an informed consent if he concludes to accept the recommended treatment." *Id*. at 673. This distinction was recognized in *Miller v. Werner*, 431 S.W.2d 116, 118 (Mo. 1968) (claim for negligent removal of cysts is separate and distinct from a claim for failure to obtain an informed consent).

"It is a plaintiff's prerogative to choose the theory upon which he will submit his case, so long as that theory is supported by the pleadings and the evidence." *Elmore v. Owens-Illinois, Inc*. 673 S.W.2d 434, 437 (Mo. banc 1984). A defendant cannot hijack a plaintiff's case by distorting her claim and then present evidence that is irrelevant to plaintiff's theory and that cannot form the basis for either a plaintiff's negligence submission or an affirmative defense. In Missouri, *Wilson v. Patel*, Mo App WD 2016 stands as the only case that has addressed the issue.

As *Wilson* stated, "[t]he relevancy of 'informed consent' evidence in a case where lack of consent has not been pled or submitted to a jury by the plaintiff at trial has not been previously discussed by Missouri courts." However, the *Wilson* court notes that the courts of other states that have addressed the issue are "essentially unanimous in their conclusions that evidence of informed consent is irrelevant as to whether a physician has committed medical negligence."

Every state that has addressed the issue has held that such evidence is irrelevant in the context of a medical malpractice claim alleging negligence in the performance of a procedure. See *Wright v. Kaye*, 593 S.E.2d 307 (Va. S.Ct. 2004), *Fiorucci v. Chinn*, 764 S.E.2d 85, 87 (Va. 2014) *Warren v. Imperia*, 287 P.3d 1128 (Or. App. 2012), *Waller v. Aggar*wal, 688 N.E. 2d 274 (Oh. App. 1996), *Spar v. Cha,* 907 N.E.2d 974 (Ind. S.Ct. 2009) (holding incurred risk is not a defense to medical negligence), *Schwartz v. Johnson,* 49 A.3d 359 (Md. 2012), *Brady v. Urbas* 2013 PA Superior 296 (Penn. S.Ct. 2013), *Hayes v. Camel*, 927 A.2d 880 (Conn. S.Ct. 2007), *Baird v. Owc*zarek, 93 A.3d 1222, 1232-3 (Del. Supr. 2014), *Matranga v. Par. Anesthesia of Jefferson, LLC*, 170 So. 3d 1077, 1093-4 (La. App. 5th Dist. 2015), *Hillyer v. Midwest Gastrointrestinal Assoc. P.C*, 24 Neb. App. 75 (Neb. App. 2016) (finding error in admission of evidence but reversal unnecessary due to curative instruction).

Wilson cited specifically to *Schwartz v. Johnson*, 49 A.3d 359 (Md. Ct Spec. App. 2012), where the issue was whether evidence related to informed consent, specifically regarding a "known complication" was relevant. The court determined that it was not, reasoning that the plaintiff was not claiming that the physician had failed to obtain his informed consent to perform the procedure, but that the physician was negligent in performing the procedure. There is no assumption of a known risk by signing an informed consent form. The *Schwartz* court stated, and the *Wilson* court affirmed, "[r]egardless of whether the patient elects to have healthcare or requires it, the patient appropriately expects that the treatment will be rendered in accordance with the applicable standard of care. This is so regardless of how risky or dangerous the procedure or treatment modality might be." *Shwartz*, 49A.3d at 371.

*Wilso*n further cited favorably the *Schwartz* holding that evidence of informed consent is irrelevant and prejudicial to the plaintiff. *Schwartz* at 374, *Wilson* at 8. "Such evidence could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from the surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong. *Wilson* at 8, *Schwartz* at 375, quoting *Wright v. Kaye*, 593 S.E.2d 307, 317 (Va. 2004). Ultimately, the *Wilson* court did not reach the exact question, because it found that the procedural posture did not support the plaintiff's position. In *Wilson*, plaintiff's counsel had failed to object to the evidence and had, instead, sought a withdrawal instruction. It is important to note that the Missouri Supreme Court has accepted this case and it is currently pending.

The law, nationally and in Missouri, clearly recognizes that evidence of informed consent is not relevant and is highly prejudicial unless plaintiff has included a specific claim for informed consent. Plaintiff has not in this case and, therefore, any evidence or argument regarding informed consent should be prohibited.

As the only relevant inquiry in this case is whether Defendant Dr. Solman's failure to diagnose and treat a post-operative knee infection falls below the standard of care, whether it is listed on the surgical informed consent form is simply irrelevant. Allowing such evidence or argument is geared toward one goal: to convince the jury that Plaintiff has somehow consented to the injury. As such, it is highly prejudicial.

2. Medical Records Admissibility

Issues often arise regarding the admissibility of medical records. Plaintiff includes this brief review for the Court's convenience.

Medical records are admissible, when properly qualified, under the Business Records Act, §490.680, R.S.Mo. Missouri Courts have deemed the following types of data contained within medical records admissible: physical examination findings, patient's symptoms and complaints, treatment and progress records, diagnosis by those qualified to make them, the results of analyses and laboratory tests, x-rays, the behavior of the patient, and those parts of the patient's history inherently necessary or helpful to the observation, diagnosis and treatment of the patient. *Johnson v. Creative Restaurant Mgmt.*, 904 S.W.2d 455, 459 (Mo. App. W.D. 1995) citing *Allen v. St. Louis Pub. Serv. Co.*, 285 S.W.2d 663, 667 (Mo. 1956). See also *Caples v. Earthgrains Company*, 43 S.W.3d 444 (Mo. App. E.D. 2001) These portions of medical records are admissible unless subject to specific objections such as irrelevancy, inadequate sources of information, self-serving, going beyond the bounds of legitimate expert opinion, or other similar substantive grounds. Id. It is for the jury to assign the appropriate weight to the evidence on the medical record. Id.

An opinion stated in a medical record is accorded the same weight as an opinion stated on the witness stand. "Medical records are almost always admissible to prove history, diagnosis, treatment, and prognosis when their authenticity is not disputed. *State v. Moore*, 88 S.W.3d 31, 36 (Mo. App. E.D. 2002), *Friese v. Mallon*, 940 S.W.2d 37, 40 (Mo. App. E.D. 1997). In fact, the Missouri Supreme Court has held "[i]t is well established law in Missouri that a proper expert medical opinion contained in a hospital record …should be accorded dignity equal to that of a similar opinion from the witness stand." *Koenig v. Babka*, 682 S.W.2d 96, 100 (Mo. App. E.D.

1984) citing *Allen v. St. Louis Pub. Serv. Co*., 365 Mo. 677, 683 (Mo. 1956). See also *State v. Foster*, 501 S.W.2d 33, 36 (Mo. 1973). It is of no consequence that the expert witness is not available for cross-examination. *Miller v. Engle*, 724 S.W.2d 637, 640 (Mo. App. 1986).

3. Voir dire

The purpose of jury selection is to seat a fair and impartial jury. A person who cannot render impartial jury service must be excluded. 28 U.S.C. §1866(c)(2), *U.S. v. Anderson* 938 F.2d 116, 118 (8th Cir. 1991) (when case turned on the credibility of police witnesses, court abused its discretion in refusing to remove panelists who admitted they were more inclined to believe police than other witnesses). See also *U.S. v. Sithithongtham*, 192 F.3d 1119, 1121 (8th Cir. 1999).

Voir dire is necessary for selecting a fair and impartial jury. Voir dire provides both the means to discover actual or implied bias or prejudice and the grounds on which the parties may intelligently exercise their peremptory challenges and challenges for cause. *J.E. B. v. Alabama*, 511 U.S. 127, 143-44 (1994). During voir dire, the court must test the qualifications and competency of the panelists to sit on a jury in a trial of the case. V*asey v. Martin Marietta Corp*. 29 F.3d 1460, 1467-68 (10th Cir. 1994), *U.S. v. Bedonie*, 913 F.2d 782, 795 (10th Cir. 1990). A court cannot restrict the voir dire in a way that destroys a party's ability to exercise its peremptory challenges. *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991).

The panelists' bias or prejudice regarding the facts of the case and the nature of the controversy are proper subjects for inquiry. *Art Press, Ltd., v. Western Printing Mach. Co*., 791 F.2d 616, 619 (7th Cir. 1986), *U.S. v. Love*, 219 F.3d 721, 724-725 (8th Cir. 2000), *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981). Likewise, the panelists' bias or prejudice regarding the parties is proper area of inquiry. *U.S. v. Lancaster*, 96 F.3d 734, 741-42 (4th Cir. 1996), *U.S. v. Kylse*, 40 F.3d 519, 524 (2d Circ. 1994).

Whether the panelists can set aside feelings of sympathy when considering a verdict is also a relevant area of inquiry, *Morrisey v. Welsch* Co., 821 F. 2d 1294, 1306 (8th Cir. 1987), as is their ability to award whatever damages the evidence justifies. *Hoffman v. Sterling Drug, Inc.,* 374 F.Supp. 850, 859 (M.D. Pa. 1974).

If a panelist is biased or prejudiced, he or she cannot serve as a juror. *28 U.S. C. §1866(c)(2)*. Doubts about the existence of bias or prejudice should be resolved against permitting the panelist to serve. *U.S. v. Nelson*, 277 F.3d 164, 202 (2d Cir. 2002), *Bailey v. Board of Cty. Comm'rs*, 956 F.2d 1112, 1128 (11th Cir. 1992).

4. Admissibility of Medical Treatise

Plaintiff anticipates that medical treatise's may be used to cross-examine witnesses in this trial.

A medical treatise is an exception to hearsay. *Federal Rule of Evidence 801(18*). A medical or other learned treatise may be admitted if: (a) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and (b) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.

5. Defendant's Burden of Proof

Defendant is held to the same burden of proof as the plaintiff regarding the causal relationship of injuries. See *Parshall v. Buetzer*, 195 S.W.3d 515, 521 (Mo. App. W.D. 2006) (recognizing that before a jury can assess an affirmative defense, all of the legal elements of the defendants' claim must be present, including causation). A party must have substantial evidence supporting an affirmative defense in order to admit the same. See *M.A.I. 32.01*; see also *Romeo v. Jones*, 144 S.W.3d 324 (Mo. App. E.D. 2004). As such, defendants must produce expert testimony linking a previous act or condition to the complaints at issue in this case to submit such evidence. *Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. E.D. 2001) (holding when an expert witness testifies that a given action or failure to act "might" or "could have" yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value). Since defendant does not have any expert testimony connecting any "possible causes" of Grussing's ongoing complaints, defendants should be prohibited from mentioning any irrelevant incidents or conditions without expert foundation linking the same.

If defendant wishes to contribute "possible" other causes of plaintiff's ongoing complaints, they must have expert causation testimony on the subject. *Senter v. Ferguson*, 486 S.W.2d 644 (Mo. App. E.D. 1974). Expert testimony regarding causation is required so as to prevent jurors from entering the "forbidden realm of conjecture and surmise." *Delisi v. St. Luke's Episcopal-Presbyterian Hosp., Inc.*, 701 S.W.2d 170, 177 (Mo. App. E.D. 1985); see also *Seippel-Cress v. Lackamp*, 23 S.W.3d 660, 668 (Mo. App. W.D. 2000) (holding that expert testimony as to causation is required so as "to guard against the danger of permitting lay jurors to establish arbitrary standards relative to matters beyond their common experience and knowledge and to decide crucial issues upon nothing more than speculation, conjecture and surmise"); see also see also *Sampson v. Missouri Pac. R. Co.,* 560 S.W.2d 573, 589 (Mo. 1978) (holding that issues that are not linked to the incident with expert testimony are properly excluded as lacking foundation). Reasonable scientific certainty or probability is required. *Schiles v. Schaefer*, 710 S.W.2d 254, 262 (Mo. App. E.D. 1986).

Missouri Courts have recently reaffirmed the requirement that expert testimony regarding causation. In *Secrist v. Treadstone*, LLC, 356 S.W.3d 276 (Mo. App. W.D. 2011), the trial court allowed evidence that the plaintiff tested positive for marijuana as impeachment and claimed relevance as to comparative fault. The Court of Appeals reversed, clearly holding that the fact that there was a positive test for marijuana is irrelevant to comparative fault absent expert testimony causally linking the test to impairment. The court held that allowing such evidence without expert testimony causally linking it to the case was an abuse of discretion.

6. Purpose of Tort Law in Missouri

Questions and objections often arise in trial with regard to basics of tort law in Missouri, particularly with regard to references to the deterrent nature of tort law.

In *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400 (Mo.App. 1997) the Western District, in deciding a case dealing with liability for an inherently dangerous activity pointed out: "Tort law is 'concerned with the allocation of losses arising out of human activities…' To achieve this objective, courts and legislatures have established rules of liability. These rules are to function to promote care and punish neglect by placing the burden of their breach on the person who can best avoid the harm." Id. at 404. (emphasis added).

Continuing the Court held: "Thus, in establishing the rule of liability implicated in this case, we logically must look to which party can best avoid the harm and manage the risk of loss of the inherently dangerous activity in question." Id.

The Lawrence Court cited among other authorities W. Keeton, *Prosser and Keeton on*

The Law of Torts 6, (5th Edition 1984). See also *Elam v. Alcolac*, 765 S.W.2d 42 (Mo.App. 1988): "The traditional and foremost policy of the tort law is to deter harmful conduct and to ensure that innocent victims of that conduct will have redress." Id. at 176. See also *Porter v. Crawford and Company*, 611 S.W.2d 265 (Mo.App. 1980) where the Court, citing the Restatement of Torts 2d made the following statement: "Tort law involves a balancing of the conflicting interests of the litigants in light of the social and economic interests of society in general." Id. at 270.

See also *Keener v. Dayton Electric Manufacturing Company*, 445 S.W.2d 362 (Mo. 1969). In *Keener*, the Missouri Supreme Court adopted the Restatement of Torts 2d, §402(a) which sets forth the elements of products liability. In doing so, the Missouri Supreme Court noted the purpose of such liability is to ensure that the cost of injuries resulting from defective products are borne by manufacturers (and sellers) that put such products on the market rather than by the injured persons who are powerless to protect themselves. *Id*. at 364.

Deterrent Nature of Tort Claims

Missouri recognizes that tort law serves multiple purposes. Not only does tort law remedy harms done – it also creates an incentive to avoid future harms. This deterrence function is not conditioned on a claim of aggravating circumstances or an award of punitive damages in a case. It is part of the function of tort law.

It is well understood that tort law serves to deter harmful conduct. *Elam v. Alcolac, Inc*., 765 S.W.2d 42, 176 (Mo.App. W.D. 1988). In fact, "[t]he 'but for' formula of causation in fact is as much an expression of legal policy as of factual quantum. As announced by our Supreme Court: The traditional and foremost policy of the tort law is to deter harmful conduct and to ensure that innocent victims of that conduct will have redress. Cognate principles of equity and economic efficiency also inform that policy: that the costs of the pervasive injury ... shall be borne by those who can control the danger and make equitable distribution of the losses, rather than by those who are powerless to protect themselves." *Blanks v. Fluor Corp*., 450 S.W.3d 308, 373 (Mo.App. E.D. 2014) (emphasis added, internal quotation and citation omitted).

Essentially, the law of torts serves a purpose to encourage people to take precautions. *Jackson By Jackson v. Ray Kruse Const. Co., Inc*. 708 S.W.2d 664, 669 (Mo. banc. 1986.) Punitive damages are not necessary for this function of tort law to come to fruition. The standard of tort recovery, compensatory damages, serve the purpose of directly compensating the victim of a tort for the losses they have suffered. Additionally, the ripple effect from those awards engages the separate deterrent effect of tort claims. That is, the fact that tort liability exists – and recovery was had – for that particular set of circumstances creates the incentive for precaution against those circumstances and thereby deters future tortious conduct.

"Awards of compensation provide economic incentives both for injured persons to seek redress from those who may be at fault and for potential tortfeasors to regulate their activities to avoid injuring others. Thus, an important by-product of the system is its ability 'to generate rules of liability that if followed will bring about, at least approximately, the efficient—cost-justified—level of accidents and safety.' Posner, '*A Theory of Negligence'*, 1 J. Legal Stud. 29, 33 (1972)." *Madden v. C & K Barbecue Carryout, Inc*. 758 S.W.2d 59, 64 (Mo. banc. 1988).

Missouri cases recognize that, in accord with the objectives of tort law, the rules borne out of tort law promote care on the part of the potential tortfeasors, who are in the best position to avoid the harm, and who are provided with an incentive to take precautions to prevent injuries. *Lawrence v. Bainbridge Apartments*, 957 S.W.2d 400, 404 (Mo.App. W.D. 1997). See also, *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 395 (Mo. banc. 1986). (Welliver, dissent, stating "Compensatory damages provide relief to the injured party, deter unreasonable and inefficient behavior, create an incentive for wrongfully injured persons to bring suit, and serve as a mechanism for avoiding the uneconomic precautions potential tort victims would undertake if injuries were not compensated. R. Posner, *Economic Analysis of Law* § 6.12 (1977).")

7. General medical malpractice issues

Elements: An act or omission by the defendant doctor that failed to meet the requisite professional standard of care; the act or admission was negligent; and it caused or contributed to cause injury to plaintiff. *Wacker v. St. Francis Medical Center*, 413 S.W.3d 37 (Mo. App. E.D. 2013), §538.210.1 R.S.Mo. 2015

Standard of Care: An expert witness must not state his own personal standard of professional care concerning the areas of care in question. Instead, the expert witness must state his opinion in a manner that leaves no doubt that the opinion is based on a well-recognized, established standard of care. *Dine v. Williams*, 830 S.W.2d 453 (Mo App. W.D. 1992).

A defendant's treatment of patients other than the plaintiff may be admissible under certain circumstances. For example, when a physician's defense includes a statement that the plaintiff's medical problem is uncommon, the plaintiff should be permitted to show that the defendant had other patients with the same problem. *Deveney v. Smith*, 812 S.W.2d 810 (Mo. App. W.D. 1991).

8. "The Rule of Sequestration"

Plaintiff would request that the Court "invoke the rule" of sequestration of witnesses, barring fact witnesses that have not yet testified from sitting in the trial, observing the testimony of other fact and expert witnesses, including reading the trial preservation testimony of other trial witnesses.

In an effort to ensure that no party has an unfair advantage over the other, that the trial is a place where only the truth is elicited, and to ensure that no party has the ability to fashion witness testimony in direct response to the trial testimony of other witnesses, plaintiff hereby requests that the Court "invoke the rule" at the trial of this matter. See, e.g., *State of Missouri v. Gibson*, 760 S.W.2d 524, 526 (Mo.App. E.D. 1988) (holding that, "Sequestration of witnesses is not the subject of a Supreme Court Rule. It is a "rule" recognized in case law. Sequestration of witnesses is a valuable tool 'in eliciting the truth . . ..") (quoting *U.S. v. Schaefer*, 299 F.2d 625, 631 (7th Cir. 1962)).

9. The personal standards of witnesses, and what they have done personally in their practice, is irrelevant, speculative and confusing to the jury.

Plaintiff anticipates that, at some point, Defendants may seek to introduce evidence of the personal practice of Defendant and Defendant's expert witness Dr. Matthew Matava. A medical witness' personal practice is irrelevant, speculative and confusing to the jury and should not be allowed. See *Swope v. Printz*, 468 S.W.2d 34, 39 (Mo. 1971); *Hurlock v. Park Lane Medical Center*, Inc., 709 S.W.2d 872, 884 (Mo.App. 1985); *Dine v. Williams*, 830 S.w.2d 453, 457 (Mo.App. 1992); *Boehm v. Pernoud*, 24 S.W.3d 759, 762 (Mo.App. 2000); and *Sosna v.*

Binnington, 321 F.3d 742, 745 (8th Cir. 2003).

Specifically, Plaintiff anticipates that Dr. Matava, Defendant's witness, may attempt to testify as to his recent experiences that Dr. Matava alleges were similar to Plaintiff's presentation to Defendant Solman. In his deposition, Dr. Matava testified that he had aspirated the knees of 3 individuals in the week before his deposition and did not send the fluid from those aspirations for analysis. The introduction of testimony by Defendant's expert witness as to what he did or did not do with patients which may or may not have been similarly situated is irrelevant and speculative and will undoubtedly introduce confusing testimony to the jury. At the very least, Plaintiff is unable to test the accuracy of Dr. Matava's testimony in that Plaintiff is unable to review the medical records of those patients to determine if they were, in fact, similarly situated.

Therefore, Plaintiff would seek to exclude such evidence.

10. A hostile witness called in a party's case in chief is subject to leading questions on direct examination and cross examination is strictly limited to the subjects raised on direct and is not subject to leading questions by a party's own attorney.

Plaintiff has listed several possible witnesses including Defendant Solman and employees of Defendant Orthopedic and Sports Medicine, Inc. If called, Plaintiff will request that this Court allow examination be conducted with leading questions. Further, Plaintiff will request that cross-examination be strictly limited to the subjects raised on direct rather than allowing Defendants to, in effect, present their case to the jury disguised as cross-examination.

Federal Rule of Evidence 611 controls. The mode and order of examining witnesses is subject to the Court's reasonable control. "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility." FRE 611(b).

Leading questions are allowed "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." FRE 611(c)(2). The Notes of the Advisory Committee on Rule 611 make it clear that the Rule codifies the tradition of limiting the scope of cross-examination to the matters testified to on direct. Adverse parties and witnesses "identified with" adverse parties are "automatically regarded and treated as hostile." This includes employees of parties.

11. This Court may take judicial notice of Plaintiff's life expectancy.

This Court may take judicial notice of Plaintiff's life expectancy. FRE 201(b)(2), *Taylor v. Otter Tail Corp.*, 484 F.3d 1016 (8th Cir. 2007). Application of the Social Security Administration Life Expectancy calculator https://www.ssa.gov/cgi-bin/longevity.cgi yields a life expectancy for Plaintiff, born October 7, 1970, of 85.5 years, or an additional 39.2 years.

Law Offices of Todd N. Hendrickson

Todd N. Hendrickson
Todd N. Hendrickson #37460
911 Washington Ave., Suite 400
St. Louis, Missouri 63101
(314) 721-8833
(314) 721-4944 fax
todd@hendricksonlaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was transmitted January 6, 2017 to the following by:

☐	Mail	☐	Facsimile
☐	E-Mail	x	Electronic Filing

David P. Ellington
Halle L. Dimar
Brown & James, P.C.
800 Market St., Suite 1100
St. Louis, MO 63101-2501

Todd N. Hendrickson